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Queer(y)ing Consummation: An Empirical Reflection on the Marriage (Same Sex Couples) Act 2013 and the role of Consummation

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Abstract

Consummation and adultery were omitted from the Marriage (Same Sex Couples) Act 2013. This article explores the issue of consummation (in particular) and offers empirical evidence in support of reform. Assessing the functioning and role of relationship recognition to LGBTQ people, this article will assess the implications of the exclusion of consummation from same-sex marriage. It draws on semi-structured, in-depth interviews conducted with a group of 29 LGBTQ people following the 2013 legislation to argue that the current law contributes to a sexual hierarchy that maintains and privileges heteronormativity, and that this system should be reformed by either abolishing the consummation requirement or redefining it to include same-sex consummation, accommodating a wide range of sexual expression. Reforming marriage law to disestablish consummation's current role would contribute both to the ongoing transformation of marriage instigated by no-fault divorce and to the queering of marriage by deconstructing heteronormativity.

Keywords

Consummation; Adultery; Marriage; Empirical Research; LGBTQ

Introduction

A sexual relationship has traditionally been regarded as an intrinsic element of marriage, such that either the lack of consummation or occurrence of adultery can justify the nullification / dissolution of a marriage. However, following the model of the Civil Partnership Act 2004, the Marriage (Same Sex Couples) Act 2013 did not extend the law of consummation¹ to same-sex marriage² and amended the Matrimonial Causes Act 1973 to state that only heterosexual conduct may constitute adultery for the purpose of divorce, for both same-sex and traditional (i.e. different-sex) marriage.³ The 2013 Act thereby produced specific inequalities that arguably reinforces a sexual hierarchy.⁴

This article discusses those inequalities,⁵ relying and building on the notion of a 'sexual hierarchy', which entails the Western appraisal of sex acts according to a hierarchical system

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¹ Matrimonial Causes Act 1973, s 12(1)(a) and (b) state that a marriage shall be voidable owing to the incapacity of either party to consummate it or to the wilful refusal of the respondent to consummate it.

² Marriage (Same Sex Couples) Act 2013, Sch 4, para 4(3), inserting s 12(2) to the 1973 Act,

³ Meaning that a party to a same-sex marriage could commit adultery with someone of a different-sex, but not of their own sex; Marriage (Same Sex Couples) Act 2013, Schedule 4, para 3(2), inserting s 1(6) to the 1973 Act.

⁴ G Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in CS Vance (ed), *Pleasure and Danger: Exploring Female Sexuality* (Routledge 1984), 150; A Maine, 'The hierarchy of marriage and civil partnerships: Diversifying relationship recognition' in F Hamilton and G Noto La Diega (eds) *Same-Sex Relationships, Law and Social Change* (Routledge, 2020), 209.

⁵ The 'quadruple lock' and 'spousal veto' on gender recognition are further contentious issues (see Marriage (Same Sex Couples) Act 2013, s 2 and Sch 5 Part 1), but they fall outside of the scope of this article. On the first, see N Sagovsky, 'Hooker, Warburton, Coleridge and the "Quadruple Lock": State and Church in the Twenty-First Century'

of value, privileging reproductive marriage and heterosexuality.⁶ I argue that the omission of consummation reinforces the apparent invisibility of sex and sexuality within same-sex marriage. In light of both common law understanding of ‘consummation’ (which is not statutorily defined) and contemporary empirical evidence of the views and experiences of LGBTQ participants, I argue that the current system reinforces an historical sexual hierarchy of ‘recognised’ sex reflecting a heteronormative bias within the law.⁷ The advent of notification-based no-fault divorce through the Divorce, Dissolution and Separation Act 2020 will remove adultery from the law entirely. But same-sex couples arguably still need an acknowledgment of their sexuality within same-sex marriage. Equality-based reform of consummation – extending the definition of sexual intercourse to be inclusive of same-sex couples – would disestablish the current hierarchy and so further sexual diversity in the law. However, alternatively, reform could abolish consummation from all forms of marriage (given its arguable irrelevance).⁸ Both options are explored here.

This article first examines the current role of consummation, in so far as that can be discerned from the legislation and case law. The methodology and theoretical framework of the empirical data and queer legal theory analysis are then addressed, before the article delves into arguments for and against removing consummation from the law, in light of empirical evidence – reflecting the lived experiences of LGBTQ individuals – that would support or oppose such a step. Finally, I use the empirical data to consider how ‘consummation’ might for legal purposes be redefined outside of the heteronormative framework, using queer legal theory to *queer* marriage, before concluding.

The consummation conundrum

Until the advent of same-sex marriage in 2013, a sexual relationship has been regarded as an intrinsic element of marriage. In *Westminster City Council v IC*,⁹ it was held that someone who lacks the capacity to consent to sexual relationship may automatically be said to lack the capacity to marry. It was held in *Sheffield City Council v E and S* that an individual would only have the capacity to marry if they understood the obligation, inter alia, ‘to love each other as husband and wife to the exclusion of all others’.¹⁰ And in *D Borough Council v AB*, it was stated that ‘a sexual component or dimension is, generally speaking, an intrinsic part of marriage’,¹¹ and that, while a sexual relationship is not a vital ingredient of marriage,¹² it is generally implicit in the marriage agreement.¹³ These remarks may be said to reflect the fact that, under the current law, the lack of consummation or adultery can lead to the nullification / dissolution of

(2014) 16 *Ecclesiastical Law Journal* 140; P Edge, ‘Lets Talk About a Divorce: Religious and Legal Wedding’ in J Miles, P Mody, R Probert (eds) *Marriage Rites and Rights* (Hart, 2015), 265.

⁶ G Rubin, n 4 above.

⁷ A Maine, n 4 above; H Brook, ‘Zombie Law: Conjugalilty, Annulment, and the (Married) Living Dead’ (2014) 22 *Feminist Legal Studies* 49.

⁸ The legal term ‘same-sex marriage’ will be used here, rather than alternatives such as ‘equal marriage’ or even ‘gay marriage’, in order to reflect the legal position it occupies, denoting a gender binary and reflecting the hierarchy of marriage.

⁹ [2008] EWCA Civ 198.

¹⁰ [2005] 1 FLR 965.

¹¹ [2011] EWHC 101 (Fam), [14], per Mostyn J.

¹² *Re X (A Child: Foreign Surrogacy)* [2018] EWFC 15, per Sir James Munby P.

¹³ *D Borough Council v AB* [2011] EWHC 101 (Fam), [14], per Mostyn J.

different-sex marriages. By contrast, the consummation provisions do not apply in same-sex marriage, and adultery must – in all cases – entail heterosexual activity.

In order to consummate a different-sex marriage, one act of consummation must take place after marriage,¹⁴ and that act must be ‘ordinary and complete, not partial and imperfect’.¹⁵ Sex need not, therefore, be regular or frequent,¹⁶ and there is no need for ejaculation or orgasm.¹⁷ Failure to consummate renders a marriage *voidable*,¹⁸ so not automatically *void*, but vulnerable to being nullified by court order on an application by one of the parties during their joint lives, such that it is treated as not having existed.¹⁹ A marriage can therefore be entirely non-sexual and still be valid.²⁰ However, ‘for opposite sex couples, once all the marriage rites are over and the couple drive off into the sunset, in legal terms the marriage is still in an inchoate state. Not until consummation does the marriage become a secure legal entity’.²¹ The omission of consummation from same-sex marriage therefore poses significant questions about the definition of sex and its role within marriage.

Consummation has been described as a ‘sexual performative’ that animates the ‘zombie category of marriage’.²² Brook argues that the impact of consummation in different-sex marriage is to maintain the heteronormative, procreative²³ potential of marriage.²⁴ Consummation is the physical act of sexual intercourse to make a marriage ‘complete’ and exists to validate and secure the spouses’ legal, sexual, and spiritual bond. Arguably, it remains to this day a symbolic recognition of the ideated nature of marriage, distinguishing marital relationships from non-sexual, platonic relationships. Same-sex marriage in England & Wales allows same-sex couples to have their relationship recognised in law as a marriage, as legally and – perhaps more importantly – symbolically²⁵ distinct from civil partnerships, as a true expression of ‘equality’ between same-sex and different-sex couples.²⁶ Marriage’s ultimate success²⁷ has been the symbolic acceptance and visualisation of the same-sex

¹⁴ *Dredge v Dredge* [1947] 1 All ER 29.

¹⁵ *D-E v A-G* (1845) 1 Rob Eccl 279, 298.

¹⁶ *P v P* [1964] 3 All ER 919; F Ryan, ‘Repackaged goods? Interrogating the heteronormative underpinnings of marriage’ in F Hamilton and G Noto La Diega (eds) *Same-Sex Relationships, Law and Social Change* (Routledge, 2020) 239.

¹⁷ *R v R* [1952] 1 All ER 1194.

¹⁸ Matrimonial Causes Act 1973, s 12.

¹⁹ J Herring, ‘Why Marriage Needs to be Less Sexy’ in J Miles, P Mody, R Probert (eds) *Marriage Rites and Rights* (Hart, 2015), 276.

²⁰ *Re X (A Child: Foreign Surrogacy)* [2018] EWFC 15, per Sir James Munby P.

²¹ Herring, n 19 above, 275.

²² Beck describes certain socio-legal structures as ‘zombie categories’ which are archaic and should be reshaped and reimagined’: U Beck, ‘Interview with Ulrich Beck’ (2001) 1(2) *Journal of Consumer Culture* 261, 262; H Brook, n 7 above, 50.

²³ But this is not to say that procreation is essential to consummation: in *Baxter v Baxter* [1948] AC 274 it was held that consummation took place even when the male party wore a condom, revealing the legal focus on the act of penetration rather than intention to procreate.

²⁴ H Brook, n 7 above, 50.

²⁵ K Hull, ‘Same-Sex Marriage: Principle vs Practice’ (2019) 33 *International Journal of Law, Policy and The Family* 53.

²⁶ A Hayward, ‘Relationships with status: civil partnerships in an era of same-sex marriage’ in F Hamilton and G Noto La Diega (eds) *Same-Sex Relationships, Law and Social Change* (Routledge, 2020), 192.

²⁷ J Eekelaar, ‘Perceptions of Equality: The Road to Same-Sex Marriage in England and Wales’ (2014) 28 *International Journal of Law, Policy and the Family* 4; S Macedo, *Just Married: Same-Sex Couples, Monogamy and the Future of Marriage* (Princeton University Press 2015); D Herman, *Rights of Passage: Struggles for Lesbian*

couple as deserving of legal recognition as a loving, caring, and successful dyadic relationship, equal to that of different-sex marriage.²⁸ Same-sex marriage contains the same benefits, rights, and responsibilities, but the omission of consummation (and adultery) from same-sex marriage law remains an outstanding inequality.

Although the government had initially intended that the courts would find a definition of same-sex consummation,²⁹ the Bill presented to Parliament excluded this requirement from same-sex marriage.³⁰ Owing to the apparent difficulties of drafting a definition of same-sex intercourse, the law did not recognise any form of sexual intercourse outside of penile–vaginal penetration. During House of Lords debates on the matter, Baroness Stowell stated that this did not create an inequality, but acted to preserve traditional marriage and heterosexual consummation.³¹ Further, she argued that, as consummation is not a strict requirement (nor sometimes a possibility, citing death-bed marriages) for traditional marriage, it should not be necessary to extend consummation to same-sex marriage.³² The ‘empty vessel’³³ of the Civil Partnership Act 2004 similarly omitted any reference to sex. Baroness Scotland stated that gay sex is ‘totally different in nature’ to heterosexual sex,³⁴ while the Women and Equality Unit remarked that ‘consummation has a specific meaning within the context of heterosexual relationships, and it would not be possible nor desirable to read this across to same-sex civil partnerships’.³⁵

Stychin argues that sex was nevertheless implicit in the Civil Partnership Act 2004 in order to distinguish it from platonic relationships and to privilege the institution. Legislators, he argues, were reluctant to interrogate the meaning of sexual intercourse critically, meaning that what constitutes ‘sexual activity’, or its absence, remains unexplained.³⁶ As he suggests, the rationale behind Parliament’s reluctance to discuss or reconsider sex may stem from a squeamishness to discuss non-heteronormative intercourse, or a worry that parties to LGBTQ relationships are often reluctant to ‘sign up’ to monogamy.³⁷ Barker, meanwhile, has argued that the absence of consummation and adultery in the Civil Partnership Act 2004 opened up possibilities for radical reform of relationship recognition, divorced from romantic mythologies

and Gay Legal Equality (University of Toronto Press 1994) 6; B Hepple, *Equality: The New Legal Framework* (Hart 2011), 23.

²⁸ ‘Different-sex’ will be used as opposed to ‘heterosexual’ in order to recognise that in many marriages, one or neither party may be exclusively heterosexual.

²⁹ Government Equalities Office, *Equal Marriage: A Consultation Paper* (2012), 10.

³⁰ Marriage (Same Sex Couples) Bill (HC Bill 126) Sch 4(3)(1)

³¹ *Hansard, Lords Debates*, vol 746, col 379 (19 June 2013).

³² *Ibid*, col 1103.

³³ C Stychin, *Couplings: Civil Partnership in the United Kingdom* (2005) 8(2) NYCLR 543, 550.

³⁴ *Hansard, Lords Debates*, vol 666, col 1479 (17 November 2004)

³⁵ Women and Equality Unit (2003b). *Responses to Civil Partnership: A framework for legal recognition of same-sex couples*. London: DTI.

http://webarchive.nationalarchives.gov.uk/+www.womenandequalityunit.gov.uk/publications/CP_responses.pdf [accessed 14th September 2020]

³⁶ C Stychin, n 33 above, 555.

³⁷ *Ibid*, 550.

and ideologies.³⁸ Marriage, however, is distinctly based in such romantic ideologies, with consummation confirming this view of marriage as romantic, monogamous, and sanctified.

Rubin articulated a sexual hierarchy that relies on the legitimation and validation of (typically) heterosexual, marital sexuality that ultimately privileges reproductive marriage and heterosexuality.³⁹ Despite the introduction of same-sex marriage, since the law recognises heterosexual sex, and only heterosexual sex, as consummation, the legal privileging of heterosexuality is maintained. While the government denied any inequality, the formal exclusion of nullity proceedings based on non-consummation from same-sex marriage restricts same-sex couples' access to the financial remedy orders provided for in the Matrimonial Causes Act⁴⁰ in a way that is arguably discriminatory.⁴¹

When conceptualising queer law reform, it is important to consider the use of rights-based tools, even when rejecting assimilatory standards,⁴² and this takes us to the European Convention of Human Rights. Gonzalez-Salzburg advocates the queering of human rights jurisprudence as a suitable means for establishing the need for legal change, stating that '[human rights] should no longer be an institution that legitimises heterosexuality by excluding and de-legitimising same-sex sexuality. Indeed, the Court should not allow human rights to be used as a tool of heteronormativity.'⁴³ It may be argued that the lack of same-sex consummation law amounts to discrimination contrary to Article 14 in conjunction with Article 8, the right to respect for private and family life. While the ECtHR has recognised a right to relationship recognition for same-sex couples,⁴⁴ it does not recognise a right to same-sex marriage.⁴⁵ The ECtHR has maintained an inflexible view that Article 12 (the right to marry) does not impose an obligation on states to grant same-sex access to marriage⁴⁶ but does establish a positive obligation in *Oliari* to provide some form of legal recognition. The Court

³⁸ N Barker, 'Sex and the Civil Partnership Act: The Future of (Non) Conjugalities?' (2006) 14 *Feminist Legal Studies* 241. Indeed, the recent creation of different-sex civil partnerships has been said to stem from a rejection of the patriarchal and romantic symbolism of marriage; A Hayward, 'Mixed-sex civil partnerships and relationality: a perspective from law' (2020) *Families, Relationships and Societies* 1.

³⁹ J Weeks, B Heaphy, and C Donovan, *Same-Sex Intimacies: Families of Choice and Other Life Experiments* (Routledge 2001), 40.

⁴⁰ Matrimonial Causes Act 1973, ss 23-24G. The exclusion of the adultery fact from same-sex marriage dissolution might be said to have the same effect, but such petitions can readily be recast in terms of 'behaviour' instead.

⁴¹ S Beresford, 'We're All Same (Sex) Now?: Lesbian (Same) Sex; Consummation; Adultery and Marriage' (2016) 12(5) *Journal of GLBT Family Studies* 468.

⁴² Article 14 of the convention recognises a right to be treated differently, where to assimilate can be viewed as discriminatory, when failing to acknowledge difference: *Thlimmenos v Greece* ECHR 2000-IV (GC), (2001) 31 EHRR 15.

⁴³ D Gonzalez-Salzburg, *Sexuality and Transsexuality under the European Convention on Human Rights* (Hart 2019), 165.

⁴⁴ *Oliari and Others v Italy* App nos. 18766/11 and 36030/11 (ECtHR, 21 July 2015).

⁴⁵ *Schalk and Kopf v Austria* App no. 30141/04 (ECtHR, 24 June 2010). See also P Johnson and S Falcetta 'Same-sex marriage and Article 12 of the European Convention on Human Rights' in C Ashford and A Maine (eds), *Research Handbook on Gender, Sexuality and Law* (Edward Elgar, 2020), 91; H Fenwick and D Fenwick, 'Fully recognising both dignity and equality values under the emergent ECHR right to a same-sex registered partnership' Wales' in C Ashford and A Maine (eds), *Research Handbook on Gender, Sexuality and Law* (Edward Elgar, 2020).

⁴⁶ *Hämäläinen v Finland* [GC] App no 37359/09, ECHR 2014, [96]; *Oliari and Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015), [192]; *Chapin and Charpentier v France* App no 40183/07 (ECtHR, 9 June 2016), [38]; *Orlandi and Others v Italy* App nos 26431/12, 26742/12, 44057/12 and 60088/12 (ECtHR, 14 December 2017), [192]. For a consideration of this recent jurisprudence see: Frances Hamilton, 'The Case for Same-Sex Marriage Before the European Court of Human Rights' (2018) 65(12) *Journal of Homosexuality* 1582; P Johnson and S Falcetta n 45 above.

held that Article 8 includes a positive obligation to recognise same-sex couples in some form. The claim that the omission of consummation from same-sex marriage amounts to discrimination may have weight, despite the Court's taking a restrictive stance as to same sex couple's right to marry. Where a State has chosen to create a legal institution, it must do so in a non-discriminatory manner, even if there is no ECHR-based obligation to introduce that right. However, it may be that the State could justify this difference in treatment by reference to the biological facts of consummation, as specifically penile/vaginal. This prompts the question whether the law should be reformed, a question that is examined below in light of empirical evidence casting light on the relevance and significance of this to LGBTQ people, who express the lived experience of same-sex marriage and indicate ways in which marriage might be queered.

Theoretical perspective and empirical methodology

The research underpinning this article uses queer theory as a lens through which to interrogate and highlight the experiences and narratives of LGBTQ populations and non-normative sexuality within marriage, and a queer methodology to highlight and investigate the marginalisation and devaluation of non-heterosexuality in legal hierarchies of sexuality.⁴⁷ Queer legal theory is ultimately anti-heteronormative and anti-essentialist, seeking to divorce legal narratives from biologism and to investigate the construction, discipline and regulation of same-sex relationships.⁴⁸ Queer theory has a transformative potential⁴⁹ that facilitates analysis of the lived experiences⁵⁰ and narratives of LGBTQ individuals,⁵¹ focusing on the intersections of gender, sexuality, law, and society.⁵² Queer theory informs an investigation of the intersecting ways in which law affects and constructs identity or practice, helps us to explore multiple ways to constitute sex and sexuality, and acts as a 'source' of transformational energy.⁵³

Many queer theorists are fundamentally opposed to marriage, arguing that it limits sexual liberation and is firmly associated with the procreative heterosexual family,⁵⁴ privileging and presupposing monogamous, domestic marital relationships.⁵⁵ Marriage selectively legitimates some couples at the expense of others,⁵⁶ endorsing the regulation and normalisation of same-

⁴⁷ A Jagose, *Queer Theory: An Introduction* (New York University Press 1996), 41; M Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (2nd edn, Harvard University Press 2000), 82; L Duggan, 'Making It Perfectly Queer' (1997) 22 *Socialist Review* 223; G Rubin, n 4 above.

⁴⁸ A Zanghellini, 'Queer, anti-normativity, counter-normativity and abjection' (2009) 18(1) *Griffith Law Review* 1.

⁴⁹ J Muñoz, *Cruising Utopia: The Then and There of Queer Futurity* (NYUP 2009) 1.

⁵⁰ S Ahmed, 'Orientations: Towards a Queer Phenomenology' (2006) 12(4) *GLQ: A Journal of Lesbian and Gay Studies* 543, 544.

⁵¹ F Valdes, 'Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex", "Gender", and "Sexual Orientation" in Euro-American Law and Society' (1995) 83 *California Law Review* 349.

⁵² D Gonzalez-Salzburg, n 43 above, 18; G Filax et al., 'Queer Theory/Lesbian and Gay Approaches' in B Somekh and C Lewin (eds), *Research Methods in the Social Sciences* (Sage 2004), 81.

⁵³ D Gonzalez-Salzburg, n 43 above, 4.

⁵⁴ J Butler, *Gender Trouble: Feminism and the Subversion of Identity* (2nd edn, Routledge 1999), 187.

⁵⁵ L Berlant and M Warner, 'Sex in Public' (1998) 24 *Critical Inquiry* 547, 548; M Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (2nd edn, Harvard University Press 2000).

⁵⁶ M Warner, 'Beyond Gay Marriage' in W Brown and J Halley (eds), *Left Legalism/Left Critique* (Duke University Press 2002) 260.

sex relationships in the guise of rights and recognition.⁵⁷ Queer theory is an important tool in analysing, critiquing, and deconstructing the supposedly rigid structures of marital law, voicing and pursuing the lived experiences of LGBTQ populations, with the ultimate aim of sexual justice.⁵⁸ Halberstam advocates the use of a queer agenda to craft alternatives to liberal entitlement to rights – alternatives that do not focus on domesticity or reproduction⁵⁹ and that embrace the ‘potentiality of a life unscripted by the conventions of family, inheritance, and child rearing’.⁶⁰ Such a perspective will be used here, in line with Zanghellini’s notion that queer legal theory can be used to investigate the regulation of relationships⁶¹ and seek non-essentialist, non-normative conceptualisations of sex and gender, ending the legitimisation of one form of sexual intercourse over others.

This article uses queer theory to analyse qualitative data that seek to reflect the lived experiences of LGBTQ participants as a result of the introduction of same-sex marriage. Drawing on the narratives and perspectives of LGBTQ participants, this research examines how LGBTQ individuals assimilate, resist or conform to various legal reforms that confer marital and familial rights on same-sex couples. Semi-structured interviews were conducted with 29 self-identified LGBTQ people aged between 20 and 68 years old.⁶² Participants were collected through mixed-method sampling including online strategic and snowball sampling, representing a mix of socio-economic backgrounds in the north-east of England. Participants self-identified as LGBTQ, and included trans and cisgender men, women, and non-binary participants. Two-thirds of the participants were legally single (inclusive of those in long-term relationships or cohabiting), and one third were married or in a civil partnership, while 10% had been in a different-sex marriage or a civil partnership, since dissolved. This study’s small scale limits its generalisability, but the findings nevertheless provide some insight into the lived experiences of LGBTQ participants in the years following the 2013 legislation.

The study was conducted in accordance with the social justice theory of ethics, which focuses on the voices of marginalised populations.⁶³ Interviews were used in order to broadcast the voices of the LGBTQ people,⁶⁴ emphasising their lived experiences and realities.⁶⁵ Participants were asked open-ended questions about marriage and sexuality, and were asked about their knowledge of the provisions regarding consummation (most were unaware of them), and their reaction to the fact that consummation and adultery were not included in the 2013 legislation. This line of questioning allowed for an informative investigation of LGBTQ participants’ responses and discourse in relation to the definition of sexual intercourse, providing evidence of how law could be informed by discourse production and lived queer

⁵⁷ J Halley, ‘Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate’ in R Wintermute and M Andenaes (eds), *Legal Recognition of Same-Sex Partnerships* (Hart 2001), 99.

⁵⁸ G Rubin, n 4 above, 149.

⁵⁹ J Halberstam, ‘The Anti-Social Turn in Queer Studies’ (2008) 5(2) *Graduate Journal of Social Science* 140, 154.

⁶⁰ J Halberstam, *In a Queer Time and Place: Transgender Bodies, Subcultural Lives* (New York University Press 2005), 152.

⁶¹ A Zanghellini, n 48 above.

⁶² The study was conducted in accordance with the requirements of the Northumbria University Ethics Committee.

⁶³ H Simons, ‘Ethics in Evaluation’, in I Shaw, J Greene, and J Melvin, *The Sage Handbook of Evaluation* (Sage, 2006), 243.

⁶⁴ D Levy and C Johnson, ‘What does the Q mean? Including queer voices in qualitative research’ (2011) 11 *Qualitative Social Work* 134.

⁶⁵ C Pope and N Mays, ‘Qualitative Research: Reaching the parts other methods cannot reach: an introduction to qualitative methods in health and health services research’ (1995) 311 *British Medical Journal* 4.

experience, demonstrating the significance of symbolic legal recognition of sexual intercourse that comes with consummation.

The participants' responses can be categorised into three themes: rejection of consummation; the significance of equality and consummation; and finally, the potential to queer consummation, through a radical reconceptualization of the definition of sexual intercourse. It will be concluded that, while the redefinition of sexual intercourse within marriage would be a positive step for encouraging a more inclusive law that recognises the existence of non-heteronormative sexuality, doing so would be a problematic attempt to recategorize different forms of sexuality and would likely be impracticable.

Rejecting consummation

A dominant theme emerging from the data collected in this study was the rejection of consummation in same-sex marriage as an unnecessary quirk of the law that is outdated and irrelevant to modern relationships, particularly same-sex relationships.⁶⁶

'There's no sex? Oh, I love it! I love it! Queen Victoria! Oh my god! So also you can't get the marriage annulled on the grounds of no consummation which is hard to imagine in the lesbian and gay world not having sex...'
(*Single lesbian*, 67)

and

'Well I kind of like that to be honest, because I think those are really, they're kind of, just something that are really arcane practices that are there because they've been in practice for thousands of years and, yeah I'm quite glad that [same-sex marriage is] not a part of that.'
(*Single gay man*, 32)

Deep societal change in the 20th and 21st centuries has radically altered attitudes to sex, and so to consummation. Marriage was traditionally seen as a justification for sex.⁶⁷ However, ongoing sexual and gender liberation and society's evolving relationship with sex means that this is no longer generally the case. Consummation is widely seen as a patriarchal concept with its male-centred, penetrative focus,⁶⁸ reliant on heterosexual intercourse, while also confirming the mono-normative (i.e. prioritising monogamy) nature of marriage.⁶⁹ It could therefore be advantageous to remove the consummation provisions, just as the introduction of no-fault divorce following the Divorce, Dissolution and Separation Act 2020 removes adultery from the law. Doing so would end the legitimisation and symbolic recognition of heterosexual sex within marriage, furthering equality between same-sex and different-sex couples.

Moreover, while some spouses – same-sex or different-sex – may see consummation as an historical anomaly, unnecessary, or irrelevant to their relationship, the current law arguably puts same-sex couples in a stronger position by enabling them to form their own sexual

⁶⁶ J Herring, n 19 above, 280.

⁶⁷ G Rubin, n 4 above, 150.

⁶⁸ J Herring, n 19 above, 280.

⁶⁹ R Bauer, 'Non-Monogamy in Queer BDSM Communities: Putting the Sex Back into Alternative Relationship Practices and Discourse' in M Barker and D Langdrige (eds), *Understanding Non-Monogamies* (Routledge 2010), 144.

relationship without an act of state-recognised sex. This perspective resonates with Eekelaar's view that *intimacy* (encompassing intimate behaviour and sexual practice) allows one's personality and personal interaction to develop free from the external gaze (the state).⁷⁰ One participant in the study echoes this, noting his antipathy towards the provisions regarding consummation, implying their irrelevance to day-to-day perceptions of marriage:

'I don't know, I'm not bothered by that because that's not something I'd ever be like "oh we've got to have sex now" like once I get married, but the adultery thing that kind of bothers me, 'cause that definitely shows, like, inequality there.' (*Single gay man, 20*)

The statement rings true with Herring's statement that 'people are quite able to get on with having sex without the need for any legal framework'.⁷¹ Herring argues that care should replace sex as being at the heart of marriage, in order to distinguish marriage from other forms of relationship.⁷² He maintains that the state does not benefit from sex itself as an activity, but does benefit from caring in a neoliberal, privatised relationship, encouraging the minimisation of state interference in social governance.⁷³ Herring considers, like Fineman,⁷⁴ that marriages based on care provide a social good, whereas sexual relationships do not, and as such that the consummation grounds should be removed from marriage. Sex and sexuality are no longer of any importance or relevance to marriage, and caring (emotional, physical, or social) is more important and valuable to the State.⁷⁵

Another participant notes the importance of equality within marriage, while also decrying the impracticality of seeking to define sex within a legal framework:

'Well that should get rid of, oh I don't know, it's difficult, it's a tricky one, I think they should be equal. Coming back, in the Netherlands, it's just the same bloody marriage, erm... I think that that's the better way to do it, that doesn't make sense to me at all, I think the whole sex thing with straight relationships should get rid of because that's old fashioned [...] Come on, how are you gonna enforce that? There's no way of knowing.' (*Married gay man, 32*)

The participant centres equality as an overriding feature of same-sex marriage, alongside the 'old-fashioned' nature of consummation, ultimately disregarding it. Warner has contended that queer theory should resist attempts to legitimate some forms of sex over others,⁷⁶ a claim that can be used to argue against same-sex marriage altogether, as he does.⁷⁷ Warner also views the legitimating of any form of sex – heterosexual or homosexual – as antithetical to queer liberation.⁷⁸ The abolition of consummation would rectify a formal inequality and remove a

⁷⁰ J Eekelaar, *Family Law and Personal Life* (Oxford University Press, 2nd edn, 2017), 71.

⁷¹ J Herring, n 27 above, 288.

⁷² *Ibid.*

⁷³ D Richardson, 'Desiring Sameness? The Rise of a Neoliberal Politics of Normalisation' (2005) 37 *Antipodes* 516.

⁷⁴ M Fineman, 'Cracking the Foundational Myths: Independence, Autonomy, & Self Sufficiency' (2000) 8 *American University Journal of Gender, Social Policy and the Law* 13.

⁷⁵ Such an idea may be resonant with the *Fitzpatrick* case, in which the courts emphasised the importance of caring relationships, equating a long-term same-sex relationship with a family relationship. *Fitzpatrick v Sterling Housing Association* [2000] 1 FLR 271.

⁷⁶ M Warner, n 47 above, 88.

⁷⁷ Along with other authors such as C Chambers, *Against Marriage* (Oxford University Press 2017), N Barker, n 38 above.

⁷⁸ M Warner, n 47 above, 88.

heteronormative focus that reflects the ‘untameability’⁷⁹ of gay relationships. This is reflected by another participant, who notes the problems inherent in defining and categorising sex for legal purposes:

‘It is a tricky thing, I don’t think we can or we shouldn’t try and define what sex is, ticking boxes, have you, have you? Making a formula for what sex is, when you might not even touch someone, just buy a webcam and have some... exchange of sexual pleasure in a way, without touching the actual person, so it is very tricky to define sex [...] I do feel a bit apprehensive when we try to box things too much, because of the fifty shades of gay, again it is regardless of gender, but in a way I think this is just bringing up the discussion of we are far more diverse than we think we are and I think that is a positive thing and acknowledging that you don’t have to be only A or B, there is a lot more in between.’
(*Civil partnered gay man*, 36)

The views expressed by these participants may demonstrate the lack of importance or interest attached to the nullity laws (which may be unsurprising given how rarely applications for nullity are made) and can certainly be used to confirm Herring’s views that consummation should be abolished. Further, it demonstrates the inherent difficulty of defining sexual intercourse in a way that avoids essentialising or biologist tropes. Indeed, adultery provisions can be described as heteronormative and mono-normative⁸⁰ reliant on heterosexual expectations of monogamy.⁸¹ The removal of the law of adultery by the new divorce reform leaves room for more nuanced understandings of non-monogamy in the law: non-monogamous behaviour may no longer be a signifier of ‘bad’ sexual behaviour that constitutes a ‘deal-breaker’.⁸² Indeed, research has shown that consensual non-monogamous behaviour is much more prevalent in same-sex relationships than different-sex relationships.⁸³ Following this line of argument, it may also be argued that consummation should not be seen as a ‘deal-maker’ on the basis that the state has no business defining and regulating sex and sexuality at either end of marriage, start or finish.

Embracing consummation and equality

Conversely, consummation could be retained (in a reformed guise) and used as a tool of equality – both in the sense of access to the institution of marriage and wider societal equality for LGBTQ people – a value that Eekelaar argues should be reflected by law and that is identified by participants in this study as an integral feature of same-sex marriage.⁸⁴ Same-sex marriage was often equated by participants with ‘equal marriage’ and presented as a legal tool to achieve and benefit from ‘full’ equality.⁸⁵ Many, upon learning that consummation (and

⁷⁹ C Stychin, “‘Las Vegas Is Not Where We Are’: Queer Readings of the Civil Partnership Act’ (2006) 25 *Political Geography* 899, 907.

⁸⁰ R Bauer, n 69 above, 144.

⁸¹ *Owens v Owens* [2018] UKSC 41. See also F Ryan, n 16 above, 238.

⁸² Particularly as non-monogamy is a popular and permanent feature of many queer relationships: R Bauer, n 69 above, 145; B Adam, ‘Relationship Innovation in Male Couples’ in M Barker and D Langdrige (eds), *Understanding Non-Monogamies* (Routledge 2010), 55; Hickson F et al., ‘Maintenance of Open Gay Relationships’ in R Bor and J Elford (eds), *The Family and HIV* (Cassell 1994); E Wilkinson, ‘What’s Queer about Non-Monogamy Now?’ in M Barker and D Langdrige (eds), *Understanding Non-Monogamies* (Routledge 2010), 255.

⁸³ F Ryan, n 16 above, 238.

⁸⁴ Eekelaar, n 70 above, 6.

⁸⁵ C Ashford, A Maine, and G Zago, ‘Normative Behaviour, Moral Boundaries, and the State’ in C Ashford and A Maine (eds), *Research Handbook on Gender, Sexuality and Law* (Edward Elgar, 2020), 409.

therefore sex) was not included in the legislation, questioned the validity of same-sex marriage:

'That's quite annoying, that, that, that, erm, that's almost as if to kind of devalue the marriage, erm, do you, that kind of seems as if marriage between a same-sex couple, erm, is less important, erm, than a marriage between a heterosexual couple. I must admit I didn't realise that, erm, no I don't think that's particularly good at all, it's, it's, seems to be going more down the route of you're calling it marriage but actually it's not equal at all, no that's quite interesting...' (*Single gay man, 26*)

By omitting consummation from the legislation on same-sex marriage, the law has rejected the symbolic significance⁸⁶ of a sexual relationship with marriage *for same-sex couples*, such that same-sex marriage – despite sharing that totemic label of 'marriage' – fails to achieve full equality. One participant in the study considered the omission of consummation to be an invalidation of same-sex intercourse that fails to fulfil the equality-based rhetoric of same-sex marriage:

'Well it's quite, that's a thing that I did know about and I find it quite interesting that it hasn't been pushed as a, what it's been 3 years now, it hasn't been pushed at all as a thing that needs to be changed at all, erm, and I think it's again, it's an invalidation of our sexual practices and our sexualities and that it still can't be written into law for some reason, and I think it probably just, I dunno if it goes back to that religious idea again of marriage is still about one man, one woman in a way, so I don't know if we've actually achieved full marriage equality in that respect either.' (*Single lesbian, 21*)

This participant's statement reflects the importance of removing the perceived naturalness of heterosexuality⁸⁷ and moving away from the traditional, religious associations of marriage.⁸⁸

The participant's comments may also reflect the failure that same-sex marriage represented, as an opportunity to redefine and reconstruct relationship recognition, moving away from the traditional, normative values with which marriage had previously been associated. This reflects Crompton's argument that the equality supposedly underpinning same-sex marriage is undermined by the creation of a legally asexual union⁸⁹ that fails to validate the existence of sex within same-sex marriage. This, she argues, rests on the legacy of *Fitzpatrick v Stirling Housing Association*⁹⁰ in which Lord Hutton (dissenting) asserted that a sexual relationship between partners was important, but could not distinguish between a once-sexual relationship of two elderly gay men and a sexless relationship of spinster sisters.⁹¹ Such a comparison had been made (unsuccessfully, with the majority) to try to justify the exclusion of some forms of relationships from protection under tenancy succession provisions of the Rent Act 1977.

⁸⁶ L Crompton, 'Where's the Sex in Same-Sex Marriage?' (2013) 43 *Family Law* 564, 566.

⁸⁷ Beresford, n 41 above.

⁸⁸ Eekelaar, n 70 above, 18.

⁸⁹ Crompton, n 86 above, 564.

⁹⁰ *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27.

⁹¹ *Ibid*, at 64.

Crompton argues that this exemplifies how the law has refused to acknowledge or value gay/lesbian sex in the same manner as heterosexual sex, despite the desirable outcome of the case with a relatively progressive majority decision.

As Crompton argues, the legal recognition of *only* heterosexual sex deprives same-sex couples of equal, symbolic recognition of their sex lives. The majority of participants in this study were unaware of the law's differential approach to consummation in the two forms of marriage. However, all participants confirmed their belief in the importance of equality in marriage law and objected to the current law's exclusionary effect:

'[B]ut looking at a very local aspect, I would guess, not just guess, I would know that some people would be like but yeah it's not really a marriage, it has some ... gimmicky, *gimmickyness* to it from some people's perspective, erm, and I suppose some straight couples, particularly who've been married for some years, 'oh how long's that gonna last?', I still think there is a lot of, well, it's just kind of, I'm struggling for the right word, it's just kind of kowtowing to the gays, and just you know, playing at the gays you know, let them have their sort of moment, it's a bit of a phase.' (*Married gay man*, 43)

The participant's certainty that society may view same-sex marriage as invalid, a gimmick, or short-lived demonstrates fears of homophobia and prejudice,⁹² diminishing the symbolic significance of same-sex marriage by calling into question the validity of his relationship and his personal decision to marry. Such a perspective reflects the heteronormative culture of marriage,⁹³ confirming the participant's belief that social standards hold heterosexuality as superior and as the only form of 'real' marriage. This apparent disparity between traditional marriage and same-sex marriage provoked an animated reaction from another participant:

'But you can in a straight marriage? What a load of rubbish! My answer, do people still get divorced on grounds of adultery? Oh, well that devalues sex doesn't it, you can't have sex unless you're um, you know, you do penetrative sex, you know, ... that's discriminatory actually isn't it.' (*Single lesbian*, 68)

This participant views the omission of sex as fundamentally devaluing same-sex marriage amounting to discrimination in the lack of recognition of viable sexual intercourse. The omission of consummation and same-sex forms of adultery implies that LGBTQ people are incapable of 'real' or 'meaningful' sex, reemphasising the phallogocentric nature of the legal definition of sex and devaluation of all deviations from that norm. While a phallogocentric focus *may* not be a problem for gay men as such, it still relies on and emphasises traditional norms of penetrative sexuality that can be particularly problematic for lesbian or trans relationships. The participant went on to express amusement and incredulity:

'How hilarious, is that because you can't mention sex and the sexual act, it's so averse and disgusting, they couldn't define it? Oh right, penetration in the missionary position? Oh how interesting, I like that, well it just shows how bloody

⁹² For discussion of the media response and parliamentary discussion, see L Featherstone, *Equal Ever After: The Fight for Same-Sex Marriage – and How I Made It Happen* (Biteback 2016). For a US perspective of the arguments for and against same-sex marriage, see S Macedo, n 27 above.

⁹³ C Chambers, n 77 above.

stupid the whole thing is. So because we don't have sex the way they do, it can't even be mentioned? ... Yeah compared to the standard heterosexual, oh my god, oh I love that, so it is a spoof without sex, how sad, how very, very sad, oh it's hilarious. Jesus wept. *Oh my god*, this is it isn't it, when people say we want equality, we want to be like them, what we wake up with is completely stupid, because we are not like them and we don't *want to be.*' (*Single lesbian*, 68)

The lack of recognition of sexual practice represents a flaw in the legislation: a failure accurately to represent and reflect the lives of those who do marry. This participant questions the motives of supposedly equality-based legislation, believing marriage to be rooted within the sexual hierarchy, but also – importantly – presents a firmly anti-assimilationist stance. Anti-assimilation can be considered as a right to be different, rejecting any pressure to marry despite its extension to same-sex couples.

Queering consummation

Participants in this study articulated views that variously supported either the abolition of consummation or the introduction of such provisions to same-sex marriage on equality grounds. I argue in this section that the legal definition of sexual intercourse could be altered in light of the empirical data and take a non-essentialist perspective that would enable a *queering* of the law. Queering the law would entail the use of a constructivist understanding of sexuality, moving beyond hetero/homo-sexual binaries, and recognising that sexual identity categories are open to renegotiation and ever-shifting signification.⁹⁴ One participant describes her perception that the law has failed to recognise queer sexuality, instead upholding heteronormative standards:

'I will also say that, it's a shame that we can't explore alternative ways within the legal system, rather than, to be us, rather than being like straight people.' (*Single lesbian*, 61)

This participant's comments reflect the notion that same-sex marriage appears to assimilate LGBTQ relationships into a heteronormative model. This statement resonates with Weeks et al's study, which argued that 'trying to tailor heterosexual laws and understanding towards gay relationships is bound to fail'.⁹⁵ Such a statement is particularly important coming from a lesbian participant, who does not practise phallocentric penetrative sex, reinforcing Beresford's argument that penetrative consummation erases lesbian sexuality.⁹⁶

Interestingly, the feat of queering the law has been achieved by the Supreme Court of British Columbia, Canada in *P (SE) v P (DD)*,⁹⁷ where the Court defined sexual activity amounting to adultery in the breakdown of a different-sex marriage so as to equalise same-sex and heterosexual activity as capable of breaking the marital bond. The case concerned a different-sex marriage in which the husband had had sex with another man, and the wife wished to

⁹⁴ A Zanghellini, n 48, above.

⁹⁵ J Weeks, n 39 above, 46.

⁹⁶ Beresford, n 41 above, 469.

⁹⁷ 2005 Carswell BC 2137, [10].

divorce on the ground of adultery.⁹⁸ The Canadian Divorce Act 1985 removed all fault-based grounds for divorce apart from adultery and cruelty, amending the Divorce Act 1967 which previously included a ground dealing with cases where the respondent had been 'guilty of sodomy, bestiality or rape, or [...] engaged in a homosexual act'. 'Adultery' was not defined in the 1985 Act. So the Court had to decide whether sexual conduct with someone of the same sex falls within the 1985 Act's meaning of adultery.⁹⁹ 'Homosexual acts' under the old 1967 Act had required only a 'positive, physical act between two persons of the same sex'.¹⁰⁰ Further, the court determined that adultery should apply equally throughout all married relationships, reliant on the monogamous expectations and assumptions of marriage.¹⁰¹ While this reinforces the mono-normative¹⁰² nature of marriage, the key point for present purposes is the Court's equality-based reasoning.

Moreover, the Court found no need to define precisely what constitutes a 'sexual act' for the purposes of adultery, stating that 'Intimate sexual activity outside of marriage may represent a violation of the marital bond and be devastating to the spouse and the marital bond regardless of the specific nature of the sexual act performed.'¹⁰³ They did so noting the lack of penetrative sex in such cases,¹⁰⁴ stating that it would not be desirable or necessary to define what constitutes adultery, merely that it is a breach of the marital bond.¹⁰⁵

The approach taken by the Canadian court is a good example of how to define sexual activity for the purposes of marriage law, free from essentialising, penetrative discourse, to identify what can be considered either a breach of the marital bond or, indeed (one could argue by extension), to complete the marital bond through consummation in a way that is non-specific to gender and sexuality.¹⁰⁶ Had Parliament included same-sex adultery – or consummation – in the 2013 Act, the English courts could have drawn on the Canadian decision in identifying what it might consist of in the same-sex context.

Activities the law could consider

The current definition relies exclusively on heteronormative penetration. Participants considered a range of activities that the law could consider if reforming from an inclusive, or queer perspective:

'Well, I don't see why they can't add a few extra definitions, erm, I think it's pretty clear to us gay people what sex is... [...] Is somebody saying that you can't commit adultery if you're gay? What is the point in that? It's quite surprising [...] saying it's worth less, less important, doesn't need to be consummated, erm and adultery can't exist in a gay

⁹⁸ Divorce Act 1985 (Canada).

⁹⁹ *P (SE) v P (DD)* 2005 Carswell BC 2137 [10].

¹⁰⁰ *Guy v Guy et al* (1982), 35 OR (2d) 584 (Ont SC)

¹⁰¹ *P (SE) v P (DD)* 2005 Carswell BC 2137 [43].

¹⁰² R Bauer, n 69 above.

¹⁰³ *P (SE) v P (DD)* 2005 Carswell BC 2137 [48].

¹⁰⁴ *Ibid* [47].

¹⁰⁵ *Ibid* [50].

¹⁰⁶ However, note that the British Columbian Supreme Court recently held that inability to maintain an erection sufficiently constituted non-consummation and granted an annulment: *SZ v XJ* (2020) BCSC 1336 (CanLII).

marriage, it doesn't matter, so yeah it's quite disappointing, like a poor man's version of a marriage.' (*Single gay man*, 32)

The comments suggest that people regard 'what counts' in this sphere as obvious, such that self-identification of what sexually intimate acts should count as consummation (discussed further below) would be a suitable basis for reforming the law in this area. By avoiding non-essentialising definitions of sexuality and using negotiable terms for sexual intercourse that rely on self-identified sexual activity, rather than essentialist definitions,¹⁰⁷ it may become possible to queer narratives regarding sex. This would take into account different ways in which all couples, may have sex and so further legitimise diverse aspects of sexuality.

Moreover, while it is important to note that sex for LGBTQ is often non-penetrative, it is also necessary to consider those for whom sex *is* penetrative, albeit without the traditionally 'essential' male counterpart, and to acknowledge how some couples' sexuality subverts gender norms:

'I suppose I, the biggest thing we do at the moment, and especially related to my gender, is that we do strap-on, and in a way, we do actually – [partner] never uses it, I'm the one that always uses it, erm, so that's the common thing for us to do at the moment, ... I think it might be, partially the gender identity, because erm, kind of what that means and how it's embodied and in the sex and what happens between us, it does feel very different to when you have no strap-on.' (*Single lesbian*, 22)

This participant and her partner use sex toys, such as a strap-on, that allow them to enjoy the experience and positions of penetration,¹⁰⁸ entirely removed from traditional notions of consummation. Penetrative (specifically, penile/vaginal) acts in a different-sex marriage are classed as consummation: that the above participant's sexual acts would not be relies on biblical concepts of consummation: the point at which husband and wife become 'one flesh'.¹⁰⁹ Despite this, another participant notes the significance of their participation in such subversive acts:

'[T]he feminist part of me thinks it's brilliant that I can seek penetration and want it and get it without it being connected to that essential male, and I think that's, that destabilises things a little bit.' (*Single lesbian*, 21)

Subversive sex serves to represent the transformative potential of queering marriage and the redefinition of "sexual" acts, while also representing feminist disengagement from heteronormative sexuality.¹¹⁰

¹⁰⁷ Zanghellini, n 48 above.

¹⁰⁸ A Ronson, R Milhausen, and J Wood, 'Reasons for Having Sex among Lesbian Women' (2012) 21(1) *Canadian Journal of Human Sexuality* 17.

¹⁰⁹ P Reynolds, *How Marriage Became One of the Sacraments: The Sacramental Theology of Marriage from its Medieval Origins to the Council of Trent* (CUP, 2016) 209.

¹¹⁰ E Sedgwick, 'Queer Performativity' (1993) 1 *GLQ: A Journal of Lesbian and Gay Studies* 13; J Muñoz, n 49 above, 1.

Monogamy

Consummation, as articulated by traditional notions of marriage (particularly the one-flesh doctrine), and in more recent articulations, such as the Canadian case and Crompton's reliance on mono-normative notions of marriage,¹¹¹ that prioritise and presuppose monogamy. A focus on monogamy should be removed in order to avoid traditional notions of relationship recognition, one that the below participant reflected on when discussing the inapplicability of adultery to same-sex relations:

'It's worrying because then it's 'equal but only so far' but then it's well those laws and technicalities are based on very outdated notions of how people live and how relationships work so I'm bothered by it but only so far, because I think that the whole thing should probably have an overhaul.' (*Single gay man*, 30)

These unequal 'technicalities' go against the 'equal' nature of same-sex marriage, relying on a narrow heteronormative and phallogocentric definition of sex as indicators of marital success. The problematic exercise of redefining consummation to be inclusive – rather than 'overhauling' the system entirely – would cause or create further difficulties, discussed further below.

As the reflections of this participant on open-relationships indicate, the omission of same-sex adultery from same-sex marriage – and the wholesale reform now effected to divorce law for all couples – could have greater implications for marriage and non-monogamy.

'[I]f you've got a contract to have an open relationship, irrespective of whether it's a gay relationship or a heterosexual relationship, where does adultery play in that? I don't know. If say for instance, a heterosexual couple gets married and they say within this marriage we are gonna have an open relationship and that's their bond and their contract, but actually the legal status says actually you can't have that contract between yourself, so that's effectively what the law is saying, and then you go on in that practice and somebody thinks actually I don't want that and you're an adulterer, is that fair, is that right? I'm not asking the question, just exploring it. So equally, erm, why would adultery be in heterosexual marriage and not be in same-sex marriage ... why would it be in both?' (*Married gay man*, 50)

Consensual non-monogamy again presents the potentiality of queer relationships to queer marriage. LGBTQ people are more likely to practise consensual non-monogamy than in different-sex marriage,¹¹² practices which increase sexual pleasure and further disable the traditional notion of marriage being a dyadic and exclusive structure. Arguably, the omission of adultery from the same-sex marriage legislation did indeed allow for more nuanced understandings of non-monogamy, taking into account, as this participant recounts, how some couples negotiate non-monogamous boundaries; such arrangements should not readily be taken to be an indicator of an 'irretrievable breakdown' in these marriages. But the introduction of no-fault divorce by the 2020 Act and the resulting removal of adultery from the law of marriage and divorce may have wider ramifications, by disestablishing the mono-normative focus of – and so queering – the law.

¹¹¹ R Bauer, n 69 above.

¹¹² *Ibid.*

Emotional aspects of consummation

Consummation was also described by participants as an emotional aspect of their marriage, a signifier of the relationship's significance. A married male participant questioned the current definition of sex for its failure to take into account the reality of sexual relationships and its basis in an exclusive form of penetration to the neglect of far wider, deeper issues, including the emotional and symbolic elements of marriage:

Participant: 'Well if it, you can't have equality in marriage if you have them excluded can you? ... and how do you, and, consummation, of a marriage, if that's defined by having sexual intercourse with a penis in a vagina, as opposed to a penis in somebody's backside, then it's nonsense, it's nonsense, because consummation of a marriage is not just a physical thing, it's actually a mental and emotional thing, I believe so, erm, yeah, I think consummation of a marriage is that, as well as the physicality.'

Interviewer: 'So you think it's definitely related to emotion as well as?'

Participant: 'Oh god yeah, absolutely no doubt about it, because actually through marriage, I think I said there, I hadn't realised how much, erm, my marriage to him would touch me emotionally, and actually I think I'd probably not had the opportunity to think about it, I'd probably not explored it in my own mind until you'd asked that question as well, erm, yeah, I probably will given me a stronger argument about what consummates marriage as well in the future which is helpful. Erm, yeah, I do think that, I think that deeper commitment towards each other is that, and you know, is consummating a marriage a one-off event? Who knows.'
(*Married gay man, 50*)

This participant's construction of consummation as not only a physical act but also a deeply emotional one echoes both the Canadian decision in *P (SE) v P (DD)* and Crompton's wish to include adultery and consummation in same-sex marriage as a crucial defining factor, on the basis that 'commitment and faithfulness should be at the heart of same-sex marriage'.¹¹³ In contrast to earlier participants' views, the above participant valued monogamy at the heart of his marriage, and viewed the omission of adultery from same-sex relationships as devaluing.

Self-identification

As noted above, if consummation were to be included in same-sex marriage, the self-identification of qualifying acts might be a viable way of doing so, though – as will be discussed below – route would carry its own problems.

Beresford has argued for a legal definition of consummation that recognises same-sex intercourse and is reliant on the self-definition of sexual acts.¹¹⁴ She considers that the 2013 Act was a missed opportunity to re-examine and redefine the law's understandings of sexuality

¹¹³ Ibid, 569.

¹¹⁴ Beresford n 41 above, 468. See also C Stychin, 'Not (Quite) a Horse and Carriage: The Civil Partnership Act 2004' (2006) 14 *Feminist Legal Studies* 79; N Barker, n 39 above.

and to relieve marriage of its patriarchal normative values,¹¹⁵ creating a legally-enforced inequality that specifically acts to the detriment of married lesbians. As it stands, consummation ‘institutionalises norms of sexual behaviour by measuring these activities against the standard of “naturalness” of heterosexual activity’.¹¹⁶ And so her central argument is that: ‘Marriage as representative of normative behaviour can be liberated (at least partially) from heteronormativity by fundamentally altering the legal discourse and jurisprudence surrounding intimate sexual relations.’¹¹⁷ Beresford advocates for the pluralisation of relationship recognition, for which same-sex marriage could be a starting point, recognising the diversity of intimate relationships,¹¹⁸ but notes that, without any formal equality, there is no chance of progression to a more substantive vision of equality.

Enabling the Courts to recognise acts of sexual activity that rely on the self-identification could re-orientate marriage law¹¹⁹ to reflect the truth of sexual activity, avoiding a focus on gender-specific acts. Such queering would allow for the symbolic recognition¹²⁰ of consummation within same-sex marriage, enabling legal recognition of the diversity and plurality of sexuality besides penile-vagina intercourse and recognising the existence, validity and importance of sex¹²¹ in same-sex relationships. Redefining the legal definition of consummation might allow same-sex marriage to realise its potential to alter dominant understandings of androcentric penetrative intercourse and monogamy, exploring ways to constitute sex and sexuality. Freed from heteronormative definitions of penetrative sex, LGBTQ people can and do actively develop and sustain sexual practices or partnerships that exist outside of the heteronormative binary. This process has been described as constructing sexuality from scratch,¹²² challenging the imposition of sexual norms.¹²³ It would be a natural recognition of this, and a means of both removing the inequality from the law and promoting liberation discourse regarding sexuality, for the law to allow consummation to be self-identified by couples. Moreover, self-identification would also allow the symbolic aspect of consummation and the deep-rooted significance of same-sex marriage to some couples to be recognised in the law.

Indeed, reflecting these ideas, one participant in the study notes the importance of avoiding strict definitions and recognising the diversity of relationships:

‘I think it should be like what feels right for the people who are getting married, and there should be a framework that facilitates that, but, under the law we need to have some degree of consistency, but what you don’t want, I guess, is, rather than having so many single rigid set of guidance, you’d be better off with – this sounds buzzword-y – but you’d be better off with some kind of framework that facilitates

¹¹⁵ Beresford n 41 above.

¹¹⁶ Ibid, 472.

¹¹⁷ Ibid, 484.

¹¹⁸ Ibid, 489.

¹¹⁹ Ibid, 468.

¹²⁰ S Boyd and C Young, “From same-sex to no-sex”? Trends towards recognition of (same-sex) relationships in Canada (2003) 1(3) *Seattle Journal for Social Justice* 757.

¹²¹ Beresford n 41 above, 468.

¹²² B Heaphy, C Donovan, and J Weeks, ‘A Different Affair? Openness and Nonmonogamy in Same Sex Relationships’ in J Duncombe et al. (eds), *The State of Affairs: Explorations in Infidelity and Commitment* (Routledge 2014), 168.

¹²³ R Robson, *Sappho Goes to Law School: Fragments in Lesbian Legal Theory* (Columbia University Press 1998), 151.

variety, which would be a very different way of basically making a law, because a lot of them don't, they are about rigidity.' (*Pansexual (Poly) feminine polarised Genderqueer*, 42)

This observation demonstrates the potential significance of self-identified acts of consummation, addressing the unique centrality of sexual activity to an individual's well-being¹²⁴ in a framework that provides some measure of consistency while accommodating the diversity of sexual expression.

Beresford has accordingly proposed an amendment to section 12 of the Matrimonial Causes Act 1973, which states: 'Consummation shall be taken to mean sexual activity between two spouses married to each other.'¹²⁵ Crompton similarly argues that consummation should be included as a symbolic indication of commitment and she would include self-identified orgasm as evidence of such commitment.¹²⁶ While it would be problematic to include orgasm as a requirement – as not all sexual activity is goal-orientated in such a way¹²⁷ – it would be possible to use 'orgasm' as evidence of sexual activity.

The current law consists of a simple requirement of penile/vaginal penetration.¹²⁸ In order to broaden and queer the definition of consummation, following Beresford's recommendations, the law should recognise any "sexual acts or activities", including (but not requiring) penetrative or oral sex, and including (but not requiring) the occasion of orgasm. That is, the validity of the marriage would depend on proof of the occurrence of some form of activity that demonstrates the sexual nature of the relationship, thus consummating the marriage. Consummation would simply require some sexual activity to have taken place, on at least one occasion after the wedding, affirming the centrality of sexual relationships to marriage.

Sometimes the court might be called on to adjudicate on whether a given activity had occurred at all – this would then call for a straightforward finding of fact. But in other cases, there might be a dispute between parties as to whether activity that it is agreed took place could be classed as 'sexual' and so constitute consummation. Here, the court would have to evaluate the activity to determine whether it is sexual, and could take inspiration for this purpose from the Sexual Offences Act 2003. That Act includes a range of sexual behaviours and activities beyond penile/vaginal penetration, including different forms of penetration¹²⁹ and non-penetrative sexual touching.¹³⁰ In the context of queering sexual activity, a wide range of acts could be considered, including, for example, penetration, oral sex, activity producing orgasm, sexual touching or the use of sex toys. Both penetrative and non-penetrative sex for both male, female, and different-sex couples could then be given attention, reflecting the scope of sexual activity beyond heterosexual, penile/vaginal intercourse. Under the 2003 Act, whether an act is 'sexual' turns on whether a reasonable person would consider the activity either to be

¹²⁴ N Bamforth, 'Same-Sex Partnerships and Arguments of Justice' in R Wintermute and M Andeneas, (eds) *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (Hart, 2001).

¹²⁵ Beresford n 41 above, 474.

¹²⁶ Crompton, n 86 above, 569.

¹²⁷ And indeed, previous case law has disregarded the need for orgasm in consummation: *R v R* [1952] 1 All ER 1194.

¹²⁸ Matrimonial Causes Act 1973, s 12(1)(a)(b): *Dredge v Dredge* [1947] 1 All ER 29; *P v P* [1964] 3 All ER 919; *R v R* [1952] 1 All ER 1194; F Ryan, n 16 above.

¹²⁹ Sexual Offences Act 2003, s 2

¹³⁰ *Ibid* s 3

inherently sexual given its nature, or to be something that *might* be regarded as sexual in nature and, given its circumstances or the purpose of any participant in it, is indeed 'sexual'.¹³¹ Whilst the use of a 'reasonable person' test to queer sex may be open to obvious criticism, its use in this setting may be an appropriate way to determine the occurrence of consummation.

So, it might be possible to do as Beresford suggests and extend the scope of consummation. However, a number of arguments can be made against any redefinition of consummation. Symbolically, establishing the legitimacy of marriage on the basis of a sexual act is a peculiarly reductive endeavour, going against the notion that marriage is essentially a caring and mutual relationship. Similarly, applying what is, by origin, a traditional *religious* concept of consummation to same-sex marriage may appear nonsensical, and determining the validity of a same-sex marriage based on its ability to replicate heteronormative legal standards is also antithetical to queer liberation. On another level, it may be argued from a privacy perspective that the law should not concern itself with the sexual exploits of married couples. Moreover, turning to more prosaic matters, broadening the definition of what 'sex' for these purposes *is* and relying on the court to determine it may simply be impractical. Consummation, as currently defined, relies on a simple, single essential act, the sole question being whether that clearly defined act had occurred or not – contrast the more problematic judicial task of determining whether a given activity is or is not 'sexual'.

All of these factors combined give further weight to arguments that consummation should be removed entirely from marriage law, thereby ending both the legal validation of *all* forms of marital sex and the legitimisation and privileging of marital relationships over those who are not married.¹³²

Conclusion

The data presented in this article, relating the perspectives and experiences of the LGBTQ participants in this study, demonstrate that there is a strong case for recognising the diversity of sexual expression that in fact exists within marriage outside heteronormative standards. The data demonstrate the importance both of sexuality and sex for same-sex couples and of providing equality in this sphere. Ultimately, the institution of marriage legitimates and recognises the relationships of those who are able to and choose to enter into the institution. The creation of same-sex marriage has ended the 'sexual apartheid'¹³³ in marriage, and the creation of different-sex civil partnerships has created equality across all formalised relationship recognition in English law.¹³⁴ However, the omission of consummation from same-sex marriage has left an area of inequality. The recognition of heterosexual intercourse (only) as deserving of consummation-status unjustifiably reinforces a notional sexual hierarchy by enshrining heterosexual sex as natural and necessary – and dismissing all other sexual acts as at best irrelevant. There is a clear need for reform.

There are two solutions: either we extend consummation to recognise and validate same-sex acts, or we remove consummation from all marriage law.

¹³¹ *Ibid* s 78.

¹³² L Berlant and M Warner, n 55 above, 548; Warner, n 44 and 53 above. R Auchmuty, 'Beyond Couples, *Burden v United Kingdom* (2008) 47 EHRR 38; [2008] 2 FLR 787; Grand Chamber of the European Court of Human Rights' (2009) 17 *Feminist Legal Studies* 205, 217.

¹³³ G Rubin, n 4 above, 150.

¹³⁴ A Maine, n 4 above.

As for the first option: recognition of LGBTQ sexuality within same-sex marriage would be a symbolic recognition of the equal significance of such sexuality. Consummation could be recognised in same-sex marriage by creating an expansive, more holistic definition of sexual intercourse and by allowing LGBTQ people to define their sexual experiences outside heteronormative biological essentialism. However, Herring considers that this focus on sex, rather than care, deprives marriage of any 'real meaning or role'.¹³⁵ Boyd and Young do not believe that a focus on sex is strictly necessary, 'except to the extent that it is needed to ensure the visibility of lesbian and gay lives', is not erased in the 'process of receiving recognition'.¹³⁶ Moreover, any approach based on self-identification would confront formidable practical difficulties in implementation in an area where parties need to have certainty about the validity of their legal status.

Turning then to the alternative: removing consummation from the law entirely (much as adultery has been removed by the advent of notification-based divorce) would also serve the equality objective, while avoiding the practical problems inherent in defining same-sex consummation. While this would preclude any express, symbolic validation of same-sex intercourse, not doing so can be justified on the basis that the state has no interest in any spouses' consensual sexual activities, especially non-procreative activities. Moreover, given the religious foundation of different-sex consummation, there can clearly be no logical counterpart for same sex relationships, and so a further argument for the abolition of consummation is that a religiously-rounded notion has no place in contemporary secular law in any event. So this second option appears to be the more practicable, easier solution, that would simply bring the sexual hierarchy implicit in the current law of consummation to an end.

Whilst of limited practical significance (in terms of numbers of nullity petitions that might have been brought on the basis of non-consummation), simply removing consummation from different-sex marriage would provide equality both in relationship recognition and in access to financial remedies in matrimonial proceedings. It would thereby, and more importantly have symbolic significance, disestablishing heteronormativity in the law.

¹³⁵ J Herring, n 19 above, 276.

¹³⁶ S Boyd and C Young, n 120 above.